A

KOAY CHENG ENG

v.

LINDA HERAWATI SANTOSO

B

COURT OF APPEAL, PUTRAJAYA
MOHD GHAZALI YUSOFF JCA
HASHIM YUSOFF JCA
JAMES FOONG JCA
[CIVIL APPEAL NO: W-02-607-2004]

C

21 MARCH 2008

FAMILY LAW: *Divorce - Unreasonable behaviour - Breakdown of marriage - Whether husband responsible - Whether wife could not be expected to live with husband*

D

FAMILY LAW: *Matrimonial property - Maintenance - Whether wife to enjoy same standard of living as she had during subsistence of marriage - Arrears of maintenance - Whether claim within three-year period under s. 86(3) Law Reform (Marriage & Divorce) Act 1976*

E

FAMILY LAW: *Matrimonial property - Division of property - Equal division of matrimonial assets - Contribution - Whether wife contributed towards purchase of assets*

This was an appeal by the appellant husband against part of the
F orders of the High Court in respect of the division of the matrimonial property made pursuant to his divorce from the respondent wife. The respondent cross-appealed against the said orders, amongst others, for a higher monthly maintenance payment in the sum of RM10,000. In the High Court, the appellant was
G ordered to pay RM6,000 monthly maintenance and arrears of maintenance plus half the current value of the matrimonial assets. It was not disputed that the appellant was a Malaysian whilst the respondent was an Indonesian Chinese. The couple married in the UK before they moved to Malaysia and registered their marriage
H under the Law Reform (Marriage & Divorce) Act 1976 ('the Act'). There were no children of the marriage. The appellant practiced as an ENT surgeon whilst the respondent, though an architect and qualified to practice in the UK was unable to practice in Malaysia as she was a non-citizen with no permanent residence.

I

Held (dismissing the appeal)
Per Hashim Yusoff JCA (now FCJ) delivering the judgment of the court:

(1) The learned judge did not err in finding that the appellant was responsible for the breakdown of the marriage based on the evidence given by the respondent. The learned judge was right in finding that the appellant had behaved in such a way that the respondent could not reasonably be expected to live with the appellant. (paras 15, 16 & 17)

(2) With the standard and cost of living of the respondent, the sum awarded was justifiable. The respondent should be placed in a position to enjoy the same standard of living as she had during the existence of the marriage. The learned judge had clearly taken into consideration the individual circumstances of both parties, the needs and responsibilities of the parties, the assets and the earning capacity of the appellant. (paras 25 & 26)

(3) The order made by the learned High Court judge was for the appellant to pay the respondent the arrears of maintenance starting from July 1998. The petition for divorce was filed on 1 September 1999 after the appellant moved out from the matrimonial home. Her claim was well within the three-year period under s. 86(3) of the Act. (paras 28, 29, 30 & 31)

(4) Although the respondent had not contributed financially to the property at No. 111 Queen's Court in London that was acquired by the appellant prior to his marriage with the respondent, the respondent had used her salaries towards the upkeep of the household as well as to buy groceries. That would be the contribution by the respondent and she was entitled for the share of the property. Therefore, it was not wrong for the judge to decide that the said property was to be regarded as matrimonial property. (para 36)

(5) The learned judge in making the orders in respect of the relevant properties had considered the contribution made by the respondent in total. It followed that the respondent was entitled to her share of the assets for her contributions to the assets. (para 39)

A ***Bahasa Malaysia*** *Translation Of Headnotes*

Ini adalah rayuan suami/perayu terhadap perintah-perintah Mahkamah Tinggi berkaitan pembahagian harta perkahwinan yang dibuat ekoran perceraiannya dengan isteri/responden. Responden
B merayu balas terhadap perintah-perintah tersebut, antara lain bagi mendapatkan nafkah bulanan sebanyak RM10,000 sebulan. Di Mahkamah Tinggi, perayu diperintah untuk membayar nafkah RM6,000 sebulan, tunggakan nafkah serta setengah dari nilai semasa harta perkahwinan. Tidak dinafikan bahawa perayu adalah
C warganegara Malaysia sementara responden seorang warga Indonesia berketurunan Cina. Mereka berkahwin di UK sebelum kembali ke Malaysia dan mendaftar perkahwinan mereka di bawah Akta Membaharui Undang-Undang (Perkahwinan & Perceraian) 1976 ('Akta'). Mereka tidak mempunyai anak. Perayu beramal
D sebagai seorang pakar bedah ENT sementara responden, walaupun seorang arkitek dan layak untuk beramal di UK, tidak layak beramal di Malaysia kerana beliau bukan seorang warganegara dan tidak mempunyai kediaman tetap.

E **Diputuskan (menolak rayuan)**
Oleh Hashim Yusoff HMR (kini HMP) menyampaikan penghakiman mahkamah:

(1) Yang arif hakim tidak khilaf dalam mendapati bahawa perayu bertanggungjawab terhadap keruntuhan rumahtangga
F berdasarkan keterangan yang diberikan oleh responden. Yang arif hakim betul dalam memutuskan bahawa perayu berkelakuan sebegitu rupa sehinggakan responden secara munasabahnya tidak lagi boleh diharap untuk terus tinggal bersama dengan perayu.

G

(2) Mengambilkira taraf dan kos sara hidup responden, jumlah yang diawardkan adalah wajar. Responden harus diletak pada kedudukan yang membolehkannya menikmati taraf hidup yang sama seperti yang dinikmatinya semasa dalam perkahwinan.
H Yang arif hakim jelas telah mengambilkira halkeadaan mereka masing-masing, keperluan dan tanggungjawab mereka, aset-aset yang ada serta keupayaan pendapatan perayu.

(3) Perintah yang dibuat oleh yang arif hakim Mahkamah Tinggi
I adalah supaya perayu membayar kepada responden tunggakan nafkah bermula Julai 1998. Petisyen perceraian telah difail pada

1 September 1999 selepas perayu keluar dari rumah kelamin. Tuntutan responden dengan itu adalah di dalam tempoh tiga tahun seperti yang ditetapkan s. 86(3) Akta.

(4) Walaupun responden tidak menyumbang secara kewangan kepada harta di No. 111 Queen's Court, London yang dibeli oleh perayu sebelum perkahwinannya dengan responden, responden telah menggunakan wang gajinya bagi menjaga keperluan-keperluan mendiaminya termasuk keperluan-keperluan dapor. Ini adalah sumbangan responden dan beliau berhak kepada sebahagian harta tersebut. Oleh itu, adalah tidak salah bagi yang arif hakim untuk memutuskan bahawa harta tersebut harus dianggap sebagai harta perkahwinan.

(5) Dalam membuat perintah mengenai harta-harta, yang arif hakim telah mengambilkira sumbangan yang dibuat oleh responden secara keseluruhannya. Ianya mengikut bahawa responden berhak kepada bahagiannya dalam aset-aset mengambilkira sumbangan beliau terhadap aset-aset tersebut.

Case(s) referred to:

Goh Leng Kwang v. Teng Swee Lin & Ors [1974] 2 MLJ 5 ***(refd)***
Lee Yu Lan v. Lim Thain Chye [1983] 1 LNS 41 HC ***(refd)***
Lumsden v. Lumsden [1963] 5 FLR 388 ***(refd)***
Re Borthwick (Deceased), Borthwick v. Beauvais [1949] CH 395 ***(refd)***
Sivajothi K Suppiah v. Kunathasan Chelliah [2000] 3 CLJ 175 HC ***(refd)***
Sivanes Rajaratnam v. Usha Rani Subramaniam [2002] 3 CLJ 300 CA ***(refd)***
Sri Kelangkota-Rakan Engineering JV Sdn Bhd v. Arab Malaysian Prima Realty Sdn Bhd & Ors [2003] 3 CLJ 349 FC ***(refd)***

Legislation referred to:

Law Reform (Marriage & Divorce) Act 1976, ss. 76(1), (2), 86

For the appellant - Chew Swe Yoke; M/s SY Chew & Co
For the respondent - YN Foo (Faridah Abdullah with him); M/s YN Foo & Co

[Appeal from High Court, Kuala Lumpur; Divorce Petition No: S8(S4)-33-1274-99]

Reported by Usha Thiagarajah

A

JUDGMENT

Hashim Yusoff JCA:

[1] This is an appeal filed by the appellant/husband against part of the orders of the High Court in respect of the division of the matrimonial property made pursuant to his divorce from the respondent/wife. The respondent/wife had also filed a cross-appeal against the orders made by the learned High Court judge on 28 May 2004. We heard the appeal on 23 June 2005 and reserved our judgment to be given at a later date. We do so now.

The Facts

[2] The appellant in this case is a Malaysian whilst the respondent is an Indonesian of Chinese descent. They married in the United Kingdom in 1986 and stayed there until 1993 when they moved to Malaysia. Upon their return to Malaysia, they registered their marriage under the Law Reform (Marriage & Divorce) Act 1976 (the Act). They were separated in 2004 and a *decree nisi* was issued on 28 May 2004.

[3] The appellant worked as an Ear Nose & Throat Surgeon (ENT) upon passing his FCRS examinations in 1991. The Respondent completed her studies and qualified to practice as an architect in the United Kingdom in the same year. Both parties managed to acquire some properties whilst in the United Kingdom but the properties were sold when they returned to Malaysia and the proceeds were used to purchase properties in Malaysia. A Mercedes Benz 190E driven by them in London was imported into Malaysia from the United Kingdom.

[4] The appellant commenced private practice in 1996 as an ENT specialist at Tung Shin Hospital and later moved to Gleneagles Intan Medical Centre upon completing his three years government service at University Hospital, Petaling Jaya. The respondent however, was not able to practice as an architect in Malaysia as she was unable to sit for the Pertubuhan Arkitek Malaysia examinations being neither a citizen nor a permanent resident of Malaysia.

[5] At the time they registered their marriage, the parties lived at No. 25-A, Bangsar Heights Condominium, Lorong Kalai, Bangsar and subsequently moved to No. 5-11-7, Pantai Panorama Condominium, Off Jalan Kerinchi, Kuala Lumpur.

The parties also purchased the following properties during the marriage:

a) An apartment at A-15-05, Sunnyville, Penang;

b) Two lots of land at Taman Lumba Kuda, measuring in total 8,605 sq ft held under title HS (M) 276/1991 PT 1252 and HS (M) 277/1991 PT 1263 both at Mukim Alor Merah, Kedah Darul Aman;

c) An apartment at 22-03A, Midland Park, Penang;

d) Two shoplots at Sunny Point, Penang;

e) A semi-detached house at Taman Golf, Alor Setar;

f) Clinic premises at Gleneagles Intan Medical Centre, Kuala Lumpur;

g) Land at Country Heights, Mines Resort, Selangor.

[6] Two companies were also set up during the marriage, namely:

a) Swiss Atlantic Sdn Bhd – A company set up as a vehicle to receive the fees charged by the appellant in his private practice. The appellant holds 90% shares in the company and his mother and sister hold 5% each.

b) Eng Hoe Leong Sdn Bhd – A company set up as a property holding company. The appellant and his two brothers hold 30% each and the respondent holds 10%.

[7] The properties at Bangsar Heights Condominium and Midland Park, Penang were sold and the appellant retained all the proceeds of the sales.

[8] In 1998, the appellant moved out of the matrimonial home whilst the respondent continued to live there. There are no children of the marriage and the appellant had not paid any maintenance to the respondent.

[9] The appellant then filed for dissolution of the marriage on 1 September 1999 and prayed that no financial provision be made to the respondent but he was willing to bear the costs of the petition.

[10] On 31 May 2000, the respondent filed in a cross-petition praying for the marriage to be dissolved and for division of all the matrimonial assets be made equally between them, maintenance of RM10,000 a month and costs of the proceedings.

[11] The learned High Court judge dismissed the appellant's petition and allowed the respondent's cross-petition. The terms of the order made by the learned judge on 24 May 2004 are as follows:

1) The husband to pay the wife RM6,000 a month as maintenance;

2) The husband to pay the wife arrears of maintenance of RM6,000 a month from July 1998;

3) The husband to pay the wife:

   i. 1/2 of the nett value of the property at A-15-05 Sunnyville Penang.

   ii. 1/2 of the value of the two lots of land held under HS (M) 276/1991, PT 1252 and HS (M) 277/1991, PT 1263 both at Mukim Alor Merah, Kedah.

   iii. 1/2 of the nett value of the property at 5-11-7 Pantai Panorama Condominium.

   iv. 20% of the nett value of shop lots at G-01 and G-14 of Sunny Point Penang.

   v. 1/2 of the nett value of the land purchased in the husband's name at Country Heights, Mines Resort.

4) The motor vehicles, Mercedes Benz C200, Registration No. SUKOM 1029 and Honda City, registration No. BFG 118 be valued and the wife be given 1/2 of their value;

5) 1/2 of the monies standing to the husband's EPF account as at the date of divorce, be paid to the wife when it is paid to the husband when he attains the age of withdrawal;

6) The husband to bear the costs of the petition and the cross-petition.

[12] Dissatisfied, the husband filed for an appeal against part of the orders. The wife had also filed a cross-appeal against the orders made by the learned judge.

[13] Before us, learned counsel for the appellant challenged part of the said decision which decides that the appellant has behaved in such a way that the respondent cannot reasonably be expected to live with the appellant and items (1) to (6) of the Order made.

[14] The respondent on the other hand is seeking to vary the order, *inter alia*, to the extent:

a) in relation to para. 3 of the order in the *decree nisi* dated 28 May 2004;

b) that the appellant's medical practice and clinic owned by Swiss Atlantic Sdn Bhd, including but not limited to all its equipment, assets and goodwill should be valued by a qualified valuer and 1/2 of the value be paid in cash to the respondent within three months of the date of the court order.

Breakdown Of Marriage

[15] We will now deal with the first issue brought up by the appellant that the learned judge had erred in law in deciding that the appellant was responsible for the breakdown of the marriage. In his appeal, the counsel for appellant argued that the learned judge erred in finding that appellant had behaved in such a way that the respondent could not reasonably be expected to live with the appellant and that the wife's version was more credible.

[16] The appellant argued that the judge's finding of responsibility for the breakdown of marriage was not supported by credible evidence but merely on an e-mail from a patient's daughter sent to the appellant using the respondent's e-mail address thanking him for some perfume. The appellant had also argued that he was never given a chance to comment on the statement made by the respondent's witness that he had brought another woman to attend a Masonic Dinner.

[17] We are unable to agree with the appellant's counsel that the learned judge had erred in his finding. Based on the evidence given by the respondent, it is clear that the appellant had another woman in his life. He had also confessed and admitted to the respondent that he had a relationship with one Ms San Ni Wong and would marry her. The respondent had also given evidence

that the appellant admitted to a relationship with one Ms Julie Tan. The statement of the respondent's witness added more weight to the allegation that the appellant had brought another woman to the Masonic Dinner instead of the respondent. No wife would be expected to stand and tolerate her husband if he had admitted that he was in love with someone else and would marry her. What more, if he, freely, without feeling guilty, brought another woman to a dinner which was meant to honour his wife and telling the whole world that he was now in a special relationship with another woman. That kind of behaviour by the appellant would definitely break a wife's heart and give her great difficulty and embarrassment to face the husband, and to live with him under the same roof. In some extreme cases, the wife would kill the husband upon finding that the husband is having an affair with another woman. This is just to show how serious and traumatic the matter would be to a wife. Therefore, we are in agreement with the learned judge that the appellant had behaved in such a way that the respondent cannot reasonably be expected to live with him.

[18] In *Goh Leng Kwang v. Teng Swee Lin & Ors* [1974] 2 MLJ 5, the Singapore Court of Appeal stated that an appellate court will not normally disturb the findings of a trial judge based on oral testimony. It was for the trial judge to balance the probabilities and to evaluate the weight of the evidence on either side and it was not for the Court of Appeal to do so.

[19] Hence, we find that the learned judge in his judgment had clearly taken into consideration the facts and evidence adduced in court. We are of the view that he had exercised his discretion correctly and for that we will not disturb his finding in respect of this.

[20] We shall now deal with the specific issues in this case.

Maintenance

[21] Learned counsel for the appellant contended that the said maintenance of RM6,000 awarded by the learned High Court judge was excessive and was not in keeping with the standard of living of the parties during cohabitation and was more than even the monthly income of the appellant during the period that he was cohabiting with the respondent in Malaysia prior to separation.

[22] The respondent's counsel on the other hand submitted that the maintenance of RM6,000 awarded is reasonable bearing in mind the standard of living of the parties and the monthly income of the appellant.

[23] We observed that in his written judgment the learned judge had considered if not all but most of the authorities cited. In his judgment, the learned judge stated:

> Further s. 78 of the Law Reform Act provides that in assessing the amount of maintenance to be paid by a man to his wife or former wife, "the court shall base its assessment primarily on the means and needs of the parties, regardless of the proportion such maintenance bears to the income of the husband, but shall have regard to the degree of responsibility which the court apportions to each party for the breakdown of the marriage.
>
> What is maintenance is defined in *Re Borthwick (Deceased), Borthwick v. Beauvais* [1949] Ch 395 where at p. 401, His Lordship Harman J held:
>
> > It is said that maintenance is the only thing that you can look at. What does that mean? It does not mean that you can only give the dependant just enough to put a little jam on his bread and butter. It has been already held that what is reasonable for one may not be reasonable for another. It must depend on the circumstances of the case. It certainly depends to some extent on the circumstances of the widow, but I think it may also depend on the circumstances of the testator, that is to say, whether he dies a rich man or not, because a rich man may supposed to have made better provision for his wife's maintenance than a poor one. Maintenance does not only mean the food she puts in her mouth, it means the clothes on her back, the house in which she lives, and the money which she has in her pocket, all of which vary according to the means of the man who leaves a wife behind him. I think that must be so. Maintenance cannot mean only a mere subsistence.
>
> Although the above case involves a testator and provision for his widow, the concept of what constitutes maintenance for a wife, as in this case, I believe, should be the same. Thus to me, what amount of maintenance the husband should pay to the wife must depend on the means and needs of the parties, taking into account the standard of living of the parties which was enjoyed by them during the marriage.

A It is the contention of the husband that the wife is not entitled to any maintenance. This is because, as argued by learned counsel for the husband, that the wife is a professionally qualified architect, qualified and licenced to practice in the United Kingdom. Hence, she is capable of earning a good living in the United Kingdom. In addition, according to learned counsel that the wife is much younger than the husband and has several gainful years ahead of her, whereas the husband is due to retire in three years time. Moreover, as pointed by learned counsel that the couple has no children to the marriage and as such the wife is free to lead her own independent life as an architect without any responsibility of any children. To support his submission that no maintenance should be ordered, learned counsel quoted the case of *V Sandrasagaran a/l Veerapan Raman v. Acttarssar Velentine Souvine Marie* [1999] Mallal's Digest 557.

The wife, on the other hand is seeking maintenance for RM10,000 a month, including arrears which ought to have been paid by the husband. In response to the issues raised by the husband, learned counsel for the wife submitted as follows:

(i) The wife's architectural qualifications

She is unable to work as an architect in Malaysia. This is because her qualifications are with the Royal Institute of British Architects, and in order to be able to practice as an architect in Malaysia, she must first be registered with the Lembaga Akitek Malaysia (LAM). To qualify for registration, she would first have to pass the Pertubuhan Akitek Malaysia (PAM) professional examinations and undergo a minimum of two year working or training with a local architect firm. However, a prerequisite for sitting the PAM examination is that she must either have a Malaysian citizenship or at least a permanent residence in this country. She possesses neither.

(ii) Returning to United Kingdom

She left the United Kingdom in 1993 some 14 years ago in order to live in Malaysia with the husband. Even before that she had ceased practicing as an architect when the husband in 1991 accepted a posting in Inverness, Scotland, where there were no job prospects. Thus, when she moved to Malaysia, she effectively gave up her right to practice architecture in the United Kingdom.

Moreover, in order for her to return to reside in the United Kingdom, after a lapse of 10 years, she would have to apply for a returning resident visa, to which she is not automatically entitled.

I am in agreement with learned counsel for the wife with regard to the issue of maintenance. The husband's contention that no maintenance should be paid is unsustainable. The Sandrasagaran's case cited by learned counsel for the husband is not on all fours with the present case. In that case, the parties were legally married in 1991. However, the marriage was never solemnized according to Hindu custom. This resulted in the parties living apart since the marriage. The marriage was never consumated and there were no children of the marriage. The petition for divorce was served on the wife in 1993. But only in 1998, they filed a claim for maintenance, almost seven years after the marriage and that too after he had commenced divorce proceedings.

In our present case, the facts are totally different. The parties had been married for the past 17 years. She had followed the husband to Malaysia and Malaysia has been her home for the past 11 years, where she thought she would live the rest of her life, in matrimony with the husband. Thus, it is unconscionable for the husband now, to insist for the wife, to go back to the United Kingdom and to practice her architecture in the United Kingdom. She had sacrificed her career to follow the husband to his various postings in the United Kingdom and ultimately in Malaysia in order to set up a home. Today the husband has very successfully advanced his status in life and is now a successful ENT surgeon. Surely the husband cannot just abandoned the wife by refusing to provide maintenance for her. This court will not be doing justice if no maintenance is ordered against the husband.

What is needed to be decided now is the amount of maintenance to be awarded to the wife. It is an established principle that in deciding what amount of maintenance the husband should pay the wife, the court must take into consideration the means and needs of the parties. In assessing the means and needs of the parties the court has always had regard to the duration of the marriage, whether there were any children of the marriage, the age of the parties, whether the husband had financially supported the wife during the duration of their marriage, the parties earning capabilities and whether the divorce would have affected the husband's position financially.

It is evidence in this case that prior to the breakdown of the marriage, when parties were still cohabiting, the following was made to the wife:

(a) residence at Pantai Panorama Condominium, paid for by the husband;

(b) use of a Mercedes Benz 190E bearing registration No. BDV 411;

A (c) access to at least two joint bank accounts;

(d) payment of all household bills and outgoings by the husband;

(e) payment of all monthly mortgage/bank loan instalments by the husband;

B (f) holidays to the United States of America, United Kingdom, Australia, New Zealand, Hong Kong, Bangkok, Indonesia;

(g) membership of the Royal Selangor Yatch Club and the Royal Selangor Club.

C The wife had set out her current expenses as in encl. 24 at para. 6 amounting to RM5,040 per month. The expenses are after the separation, that is, when the husband ceased to maintain her and does not include various items which were made available to her during the marriage by the husband such as membership of D clubs, holidays and use of vehicle. It also does not include the cost of her accommodation as the husband is still paying the monthly instalments on the bank loan taken for the purchase of the Pantai Panorama Condominium, where the wife is residing.

E The husband filed his affidavit of means on 7 February 2002. The husband stated that his gross monthly income is RM10,000 as an employee of Swiss Atlantic Sdn Bhd. However, this is being disputed by the wife. It is the submission of learned counsel for the wife that the husband had not been truthful about his income and had failed to make full and frank disclosure. This court has F been urged to draw adverse inferences with regard to the husband's income as the result of his failure to make full and frank disclosure as provided for under s. 114(g) of the Evidence Act 1950. Learned counsel referred to the case of *Leow Kooi Wah v. Philip Ng Kok Seng (Fifi Leong Kam Chon as co-respondent)* [1997] 2 AMR 2108; [1997] 3 MLJ 133, where Justice Mahadev G Shankar speaking for the High Court held:

> Whatever the disclosure is by affidavit of facts, by affidavit of documents or by evidence on oath, the obligation of the husband is to be full, frank and clear in that disclosure. Any H shortcomings of the husband from the requisite standard can and normally should be visited at least by the court drawing inferences against the husband on matters the subject of the shortcomings.

In the present case, the husband's attitude mirrors the husband I described by Justice Mahadev Shankar in the Leow Kooi Wah's case. The husband has dragged his feet in every aspect in relation to discovery in this case. He had attempted to avoid disclosing information in relation to his means. As such, the husband's

> declaration which he finally did, that his gross income as RM10,000 is questionable. This is especially so when the documents clearly show otherwise.
>
> Thus, I am unable the accept the husband's declaration that his income is RM10,000 a month. To me, the means of the husband in this case is more than RM10,000 a month. But it is unfortunate that the amount could not be ascertained because the husband did not make a full and frank disclosure of his income. Thus, the husband should not be complaining when this court is drawing inferences against him. However, this does not mean that the wife's request of RM10,000 a month as maintenance should be granted fully. Considering the facts of this case and applying it to the principles that I have mentioned earlier, I am of the view that an amount of RM6,000 a month as maintenance for the wife is a reasonable amount, to commensurate with the lifestyle and standing of the couple during the marriage.

[24] From the above passages, it is clear to us that the learned judge had considered in full the request payment for maintenance by the respondent and had also taken into consideration the authorities cited to him. The learned judge then decided to exercise his discretion to award RM6,000 to the respondent as maintenance and the learned judge had given his reasons for doing so.

[25] We are of the view that with the standard and cost of living of the respondent, the sum awarded is justifiable. We are in agreement with the learned counsel for the respondent that the respondent is to be placed in a position to enjoy the same standard of living as she had during the existence of the marriage. In *Lumsden v. Lumsden* [1963] 5 FLR 388, the court held:

> ... In the second place in awarding maintenance the court endeavours, subject to the husband's financial position, to place the wife in a position to enjoy the same standard of living as she did during the marriage ...

(See also *Re Borthwick (Deceased), Borthwick v. Beauvais* [1949] CH 395, *Sivajothi a/p K Suppiah v. Kunathasan a/l Chelliah* [2000] 3 CLJ 175.)

[26] The learned judge had clearly taken into consideration the individual circumstances of both parties, the needs and responsibilities of the parties, the assets and the earning capacity of the appellant.

In *Sri Kelangkota-Rakan Engineering JV Sdn Bhd v. Arab Malaysian Prima Realty Sdn Bhd & Ors* [2003] 3 CLJ 349, the Federal Court held that even assuming for a moment that the Court of Appeal erred in the application of the principles of law to the particular set of facts in the instant appeal, there is no room for that court to reverse the concurrent findings of fact made by the High Court and the Court of Appeal since it is trite that the appellate court is not prepared to interfere with the concurrent findings of fact made by the courts below.

[27] We are of the view that the learned judge had exercised his discretion correctly and for that again, we see no reason for the appellate court to interfere.

Arrears Of Maintenance

[28] As to the issue of payment of maintenance arrears which was ordered to be paid to the respondent starting from July 1998, it was the contention of the appellant that the order made by the learned judge was against the ambit of s. 86(3) of the Act, which does not allow recovery of arrears if accrued more than three years before the institution of the suit. The appellant also contended that the respondent had never made any application for interim maintenance and therefore she had sat on her legal rights for maintenance pending suit. She therefore should not be allowed to claim more than three years of maintenance arrears.

[29] It was the contention of the respondent that she claimed for arrears of maintenance starting from July 1998 as the proceedings were instituted by the appellant in November 1999. She is therefore well within the three years and in fact is only in arrears of a mere one year before the institution of the proceedings. She further contended that the trial was delayed purely because of the appellant's refusal to file the necessary documents and his evasiveness on the witness stand.

[30] In dealing with this issue, we shall refer to s. 86 of the Act which states:

> (1) Subject to sub-s. (3), arrears of unsecured maintenance, whether payable by agreement or under an order of the court, shall be recoverable as a debt from the defaulter and, where they accrued before the making of a receiving order against the defaulter, shall be provable in his or her bankruptcy and, where they accrued due before his or her death, shall be debt due from his or her estate.

(2) Subject to sub-s. (3), arrears of unsecured maintenance which accrued due before the death of the person entitled thereto shall be recoverable as a debt by the legal personal representatives of such person.

(3) No amount owing as maintenance shall be recoverable in any suit if it accrued due more than three years before the institution of the suit.

[31] It is clear that the order made by the learned High Court judge was for the appellant to pay the respondent the arrears of maintenance starting from July 1998. The petition for divorce was filed on 1 September 1999 after the appellant moved out from the matrimonial home. We are in agreement with learned counsel for the respondent that her claim is well within the three years' period. The appellant cannot therefore refuse to pay the maintenance and cannot say that the respondent had sat on her rights as she has all the rights to claim for the maintenance and is entitled for that. Hence, we hereby agree with the learned High Court judge that the respondent should be entitled for the arrears of maintenance starting from July 1998.

Division of Matrimonial Property

[32] We now turn to the question of division of matrimonial property, which is governed by s. 76(1) and (2) of the Act, and it states as follows:

(1) The court shall have power, when granting a decree of divorce or judicial separation, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or the sale of any such assets and the division between the parties of the proceeds of sale.

(2) In exercising the power conferred by sub-s. (1) the court shall have regard to:

a) the extent of the contributions made by each party in money, property or work towards the acquiring of the assets;

b) any debts owing by either party which were contracted for their joint benefit;

c) the needs of the minor children, if any, of the marriage,

and subject to those considerations, the court shall incline towards equality of division.

[33] Learned counsel for the appellant contended that the learned High Court judge had erred in law and facts when he found that the following are matrimonial assets:

a) no. 111, Queen's Court, London;

b) 53 Ringmore Rise;

c) 40 Derby Hill;

d) the 2 lots of land in Taman Lumba Kuda, Alor Setar;

e) the 2 shoplots at Sunny Point Penang;

f) the semi-detached house in Taman Golf, Alor Setar;

g) the Mines Resort land;

h) monies credited into the Petitioner's EPF account after date of separation.

[34] The appellant also contended that No. 111 Queen's court was acquired in 1984 by the appellant during his marriage with his ex-wife Thong Chiew Koay and sold it not long after he married the respondent. He also contended that there was no proof that the respondent had substantially improved or contributed in any way whatsoever to substantial improvement of the property during the marriage to bring her within the meaning of s. 76(5) of the Act. The respondent on the other hand gave evidence that when the parties were living in 111 Queen's Court, her salary was used towards the upkeep of the husband as well as to buy groceries. The appellant's income was thus freed to pay for the mortgage instalments for the said property.

[35] The learned High Court judge in his judgment ordered that the property be regarded as matrimonial property when he held:

> I am unable to accept the husband's contention that the monies from the sale of the properties in United Kingdom belonged to him only. To me, the wife has in her evidence proved direct contribution to the purchase of the properties in United Kingdom. No 111, Queen's Court, Queensway, although purchase at the time with a loan in the name of the husband and his second wife, by the husband's own admission that he had already lived separately and he had sought the assistance of his ex-wife to use her name to assist in the application for the bank loan. At that time, the husband was actively courting the wife and after

marriage they lived at the said property. During the time they lived there, the husband was working at St Helier's Hospital earning GBP 1,400 a month. The wife was working at Moxley, Jenner & Partners as an architect. According to the evidence, the financial arrangements between them then were that the wife paid towards the upkeep of the household as well as buying groceries while the husband paid for the mortgage instalments for the said house. Thus, it cannot be said that the wife did not contribute financially on the said property.

[36] We are in agreement with the learned judge that the respondent cannot be said to have not contributed financially to the said property. The respondent had used her salaries towards the upkeep of the household as well as to buy groceries. To us, this would be the contribution by the respondent and she is entitled for the share of the property. Therefore, it is not wrong for the judge to decide that No 111, Queen's Court is to be regarded as matrimonial property. In *Lee Yu Lan v. Lim Thain Chye* [1983] 1 LNS 41, the wife had claimed that she had contributed to the matrimonial home by "caring and rearing the children at home" and "other general duties attendant" to her "housewifely" duty. In that case, the house was bought by the husband, and he had sold it for RM191,000 of which RM41,000 was paid by the purchaser to the husband as deposit. The court considered the debts the husband had to pay, the possibility of creditors pressing for payment for some of his liabilities, and the court's proposal to make an order for maintenance for the wife. The court decided that she be given RM60,000, which was about 1/3 of the full purchase price of RM191,000.

[37] In the instant case, the learned judge had also made a finding regarding the properties in United Kingdom which were sold during the subsistence of the marriage. No 111, Queen's Court, Queensway was sold for GBP 146,000, No. 53, Ringmore Rise, Forest Hill was sold for GBP 179,000 while No. 40, Derby Hill was sold shortly before the parties returned to Malaysia. The division of these properties is not in issue as they all had been sold. The proceeds of the sales were then used to purchase the properties in Malaysia.

[38] As to the properties disputed in Malaysia, the learned judge made the following orders:

(i) A-15-05 Sunny Ville, Penang

This property was purchased in the joint names of the husband and the wife. It was purchased in 1993 for RM202,000. According to the husband the deposit and purchase price of the property was paid for by using the proceed of sale of the property at 40, Derby Hill, United Kingdom. Since the property is under joined names of the husband and wife and there is an overdraft taken against the property, the wife should be entitled to one-half of the net value of the said property.

(ii) Land at Taman Lumba Kuda

This property is registered in the sole name of the husband. It is the wife's contention that this property was bought by the parties with the intention of building a house for the parties to reside in upon their return to Malaysia. To support her claims, she produced a letter (exh. R48) from the husband to his brother wherein the husband had stated:

> Thank you for Taman Golf home plan. They are receiving attention from Linda. We have opted for Lot No 2 as previously agreed by Eng Hai. (husband's brother in law).

The husband admitted that the word "we" in exh. R48 referred to himself and the wife. However, his evidence in regard to this property is punctuated with contradictions. In his reply to answer to the cross-petition (encl. 7) he had stated at para. 12.4 that these plots of lands were purchased by him and his sister jointly with their joint funds. However, in his examination in chief, the husband states that "the two plots of land in Alor Setar, Kedah were bought by me on behalf of my sister Koay Cheng Sim". Still further, the husband stated that the land was "meant for my parents". As to why the land was registered under his name, his answer during his re-examination was that because the owner of the land would only sell the land to him and nobody else. No doubt the husband called his sister, Koay Cheng Sim (PW3) as a witness to corroborate his story. But her evidence failed to explain as to why the land was registered under the name of her brother.

To me, taking the evidence as a whole, it is my finding that the land at Taman Lumba Kuda, was purchased by the husband not on behalf of his sister, nor meant for the husband's parents, but was purchased with the intention of

building a house for the parties to reside upon their return to Malaysia. Thus, the wife is entitled to one-half of the value of the two lots of land at Taman Lumba Kuda.

(iii) Bangsar Heights Condominium, Lorong Kalai Bangsar, Kuala Lumpur

This was the first matrimonial house in which the parties lived in Malaysia. It was purchased in 1993 and the parties moved into the condominium in 1994. However, this property was sold for RM250,000 in 1996, and as such is no longer an issue.

(iv) 5-11-7 Pantai Panorama Condominium Off Jalan Kerinci, 59200, Kuala Lumpur

Pantai Panorama was the second matrimonial home of the parties in Malaysia. It was purchased in 1994 in the husband's name and the parties moved in early 1997. This property was purchased for RM269,100. The wife's evidence is that the deposit of RM75,500 was paid from the monies brought back from United Kingdom together with the balance funds obtained from refinancing the Mercedes 190E registration No BDV 411. The rest of the purchase was financed by a loan from Pacific Bank.

The husband admitted that the property was financed by the monies brought back from United Kingdom amounting to RM75,000 cash and a loan from Pacific Bank. But he contended that he bought this property for personal investment. The wife in his evidence, testifies that, it was the intention of the parties that the said property would be their matrimonial home. The letter of offer to purchase from the developer dated 15 April 1993 was adduced as evidence, where it could be seen that the letter was addressed to both the husband and wife and both of them signed the letter in acceptance of the offer. It is also the evidence of the wife that she supervised the renovation works including the addition of air-condition points, electrical rewiring, lighting points and variation on flooring in the living room before the parties moved in. According to the wife, when they moved in, she had to monitor rectification work which, amongst others, included replacing the parquet in the master and second bedroom. This part of evidence of the wife was not challenged by the husband. As such I have no hesitation to conclude that the said property is the matrimonial home and the wife is entitled to one-half of the net value of the said property.

A (v) Condominium at 22-03A, Midland Park, Penang

The property was purchased in joint names in 1995 for RM250,000 by a joint housing loan for RM200,000 in the names of the parties. However the property was sold for the amount RM380,000 in 1998 by the husband.

B (vi) Land at Country Heights, Mines Resort

It is admitted by the husband that he bought a piece of land at the Mines Resort costing RM600,000 financed by a 100% loan which he has partly repaid. I am also making an order C that the wife be entitled to one-half of the net value of the property of the said land. I am making the above mentioned orders because the properties were bought during the marriage. Moreover, as admitted by the husband that most of the properties in Malaysia were paid using the monies D repatriated from the United Kingdom. The evidence also revealed that some of the properties bought were sold and the proceeds were used to purchase other properties. I am unable to accept the husband's contention that the monies from the sale of the properties in United Kingdom belonged to him only. To me, the wife has in her evidence proved E direct contribution to the purchase of the properties in United Kingdom. No 111, Queen's Court, Queensway, although purchased at the time with a loan in the name of the husband and his second wife, by the husband's own admission that he had already lived separately and he had F sought the assistance of his ex-wife to use her name to assist in the application for the bank loan. At that time, the husband was actively courting the wife and after marriage they lived at the said property. During the time they lived there, the husband was working at St Helier's Hospital earning GBP 1,400 a month. The wife was working at G Moxley, Jenner & Partners as an architect. According to the evidence, the financial arrangements between them then were that the wife paid towards the upkeep of the household as well as buying groceries while the husband paid for the mortgage instalments for the said house. Thus, it cannot be H said that the wife did not contribute financially on the said property. No 53, Ringmore Rise, Forest Hill was purchased for the price of GBP135,000 in the name of the husband, but with a joint loan in both their names. Surely the husband cannot just dismiss the wife's contribution to the said property. No 40, Derby Hill was purchased in the name of I the husband's brother, (Hong Cheng Leong) as their nominee because at the time of the purchase the husband did not have a permanent appointment, and it was therefore not

possible for him to get a loan under his name. Furthermore, the names of both parties were still tied up with the joint loan taken out for the purchase of 53, Ringmore Rise. The husband denied that he purchased the property at 40, Derby Hill, contending the property was purchased by his brother. However, his contention is contrary to the following evidence:

(a) A sum of GBP400 was transferred each month from the husband's and wife's joint account to Koay Cheng Leng. But according to the husband GBP400 was for renting this property from his brother. But the alleged renting was never pleaded by the husband in his reply and answer to the cross-petition. Thus, his allegation that the monthly sum of GBP400 remitted to his brother's account towards rental is clearly an afterthought.

(b) They continued to make the GBP400 monthly payments to the husband's brother even when they had moved to Cardiff Wales, for 13 months.

(c) The property was sold in 1992, shortly before the parties returned to live in Malaysia. In cross-examination the husband admitted that the property was sold for a net profit of GBP28,000. The sum was transferred by his brother to his bank account.

(d) In a letter from the husband to another brother, the husband clearly states that the GBP28,000 were the proceeds of sale from the said house when he stated "Leong has recently made several remittance to his Citybank account around GBP30,000. These are the balance of the proceeds from the sale of my house in London".

(e) Shortly before the couple returned to live in Malaysia, the husband had drawn a list of the joint assets of the couple (exh. R29) where the property at 40, Derby Hill was listed as an asset of the couple. Thus, taking all the evidence as stated above, there can be only one conclusion that the property at 40 Derby Hill was purchased by the husband and the wife using the husband's brother's name as their nominees. The net proceeds of the sale of GBP28,000 was remitted back to Malaysia and used to pay for the purchase of the properties in Malaysia.

A

Eng Hoe Leong Sdn Bhd

The wife is seeking 40% of the value of two properties registered under Eng Hoe Leong Sdn Bhd be divided equally between the husband and herself. The shareholders of the company are as follows:

B

(i) husband – 30%

(ii) wife – 10%

(iii) Koay Chee Leong – 30%

C

(iv) Koay Cheng Hoe – 30%

The company is a property holding company which owns two shoplots:

D

(1) G-01, Sunny Shopping Centre, Penang.

(2) G-14, Sunny Shopping Centre, Penang.

Unit G-01 was purchased for RM433,500 while Unit G-14 was purchased for RM601,400. Thus the total purchase price for both units was therefore, RM1,034,900.

E

It is admitted by the husband that the purchases of the two units were financed by a term loan of RM550,000 and overdraft of RM250,000, leaving a balance of RM234,900. Further, the husband admitted that the balance of

F

RM234,500 was financed by loan given by the husband and his brother Koay Cheng Leng and Koay Cheng Eng. The husband himself gave a loan of RM51,000 which was paid using monies brought back from the United Kingdom. It is also admitted by the husband that, he channelled the proceeds of sale of the property that is Midland Park, registered in the joint names of the husband and wife amounting to RM85,000 into the company. Presently both properties are rented out.

G

Thus, on the facts and considering the combine shareholding in the company between the husband and wife is 40% I am

H

of the view, the wife should be given 20% of the net value of the shoplots at G-01 and G-14, Sunny Point, Penang.

Swiss Atlantic Sdn Bhd

I

The wife has given evidence that she assisted the husband in the setting up and administration of the clinic at Tung Shin Hospital by:

(a) attending to the bookkeeping;

(b) monitoring the expenses and program of the clinic;

(c) counter-checking the portion of professional fees due to Swiss Atlantic Sdn Bhd from Tung Shin Hospital;

(d) preparing letters and reports dictated by the husband;

(e) fixing appointments for patients;

(f) running errands for clinic purpose to the post office, banks etc.

It is the contention of the wife that her assistance at the clinic at Tung Shin Hospital enabled the husband to devote his energy to the running of the clinic. This in turn helped the husband to establish his name as one of the foremost in the area of ENT. According to her it was this success of his clinic at the Tung Shin Hospital and financial resources therefore that enable the husband to move and set-up his practice at the Gleneagles Intan Medical Centre. Thus, it is the contention of the wife that she had contributed towards the setting up of the clinic at Tung Shin Hospital and its development or evolution subsequently into the clinic at Gleneagles Intan Medical Centre should be valued. The valuation, according to the wife, should include the company Swiss Atlantic Sdn Bhd, its equipment, goodwill and assets (including revenue generated by the clinic) and she be given one half of its value. The Court of Appeal case of *Sivanes a/l Rajaratnam v. Usha Rani alp Subramaniam* [2002] 3 AMR 2729; [2002] 3 MLJ 273 was cited as the authority. In Sivanes case, the husband was also a doctor who ran a clinic, and the Court of Appeal accepted that the wife was entitled to a share of the clinic based on the High Court's findings that the wife had contributed to the setting up of the clinic by, amongst others:

(i) standing as guarantor for banking facilities.

(ii) selling the family car to tide over the difficult period; and

(iii) utilising joint savings in the opening of the clinic.

In our present case, the facts are quite different. The alleged contribution by the wife was strongly denied by the husband. In fact, the husband produced a witness, Saraswathy a/p Sinnathi (PW2) to give evidence. PW2 is a nurse, serving the husband at Tung Shin Hospital. In her evidence, she said that the wife only came to the clinic at Tung Shin

Hospital twice and it was to get something from the husband. Thus, according to her the wife did not help in the setting up or the operation of the clinic. Taking the evidence of the wife as well as the evidence of the husband and PW2, I am unable to conclude that the wife had contributed towards the setting up of the clinic, to entitle her a share of the clinic based on the principle of Sivanes case.

Motor Vehicles

It was the wife's evidence that two cars were sold in the United Kingdom to purchase the Mercedes Benz which was subsequently imported into Malaysia and given registration No BDV 411. The two cars that were sold were a BMW driven by the husband and a Renault driven by the wife. The husband admitted that the Mercedes Benz was also intended for the use of the wife. The Mercedes Benz was later brought back to Malaysia and given the registration No BDV 411. After the separation, the husband took sole possession of the said Mercedes Benz BDV 411. The husband later leased the Mercedes Benz BDV 411 to Swiss Atlantic Sdn Bhd for RM120,000. Swiss Atlantic later purchased another Mercedes Benz, this time C200 registration No SUKOM 1029. In 2001 Swiss Atlantic Sdn Bhd sold the Mercedes BDV 411 and purchased a Honda City 1.5 in the name of the husband. It is the contention of the wife that the car should be put into the pool of joint assets for the following reasons:

(a) The Mercedes Benz, bought in the UK and brought to Malaysia, came from a joint fund.

(b) The husband had intended the Mercedes Benz registration No BDV 411 for the use of the wife.

(c) The Mercedes Benz registration No BDV 411 was leased to Swiss Atlantic Sdn Bhd and the husband made a sum of RM120,000 in the process.

I agree with the contention of the wife. Accordingly, the vehicles Mercedes Benz C200 registration No SUKOM 1029 and Honda City registration No BFG 118 should be valued and the wife be given one half of its value.

Employees' Provident Fund

It is the contention of the wife that the husband's Employees's Provident Fund (EPF) monies should be made available for division as EPF monies are matrimonial assets liable for division. The case of *Ching Seng Woah @ Cheng*

Song Huat (p) v. Lim Shook Lin & Anor [1997] 1 AMR 214; [1997] 1 MLJ 109, was cited as the authority. I am of the same view that EPF contributions are matrimonial assets when acquired during the marriage. In the present case the evidence clearly pointed to the fact that the EPF contributions of the husband were made during the marriage. From the husband's own documents in bundle J, it can be seen that the husband's EPF opening balance was zero in 1993, that is, when the parties returned to Malaysia. In the first three years the husband completed his government service at University Hospital and thereafter started the private practice at Tung Shin Hospital, his EPF amount has grown as follows:

Year Exhibit Amount

1993 Bundle Jpg 285 RM 4,387.00

1994 Bundle Jpg 286 RM 21,614.41

1995 Bundle Jpg 287 RM 37,808.41

1996 Bundle Jpg 288 RM 53,017.47

1997 Bundle Jpg 289 RM 83,016.45

1998 Bundle Jpg 289 RM 105,237.17

1999 Bundle Jpg 290 RM 114,656.40

2000 Bundle Jpg 291 RM 188,205.78

Thus, it can be seen that while the husband had accumulated as in the year 2000 the sum of RM 188,205.78 in his EPF account, the wife has no EPF monies. From her perspective, she had entered into a marriage with the intention of growing old with the husband and on his retirement they would both have been able to enjoy the benefit from the monies set aside in EPF contributions. The husband's EPF would have been used for the benefit of them both. Now with the breakdown of the marriage, the husband should not be allowed to solely benefit from the EPF. Accordingly, I am making an order that the wife be entitled to half of the amount standing to the account of the husband's EPF account as at the time of this divorce and such monies should be paid out to the wife when the same is made payable to the husband.

[39] From the passages above, it is clear to us that the learned trial judge, in making the order, had considered the contribution made by the respondent in total. It is our view that the respondent is entitled to her share of the assets for her contributions to the assets. I would like to quote what Abdul Hamid Mohamad JCA said (as he then was) in *Sivanes Rajaratnam v. Usha Rani Subramaniam* [2002] 3 CLJ 300, at p. 306:

> ... This view, in my opinion, is consistent with the wording and spirit of s. 76. That section talks of "division" of assets acquired during the marriage and provides the factors that should be taken into account when making the division.
>
> Besides (I am speaking generally here) in marriage, both spouses share everything, both contribute towards the home and family in one way or another, to a bigger or smaller extent. Where both spouses work and earn income, each of them inevitably spends his or her own income for the family, Similarly, where there is income from an asset purchased during the subsistence of the marriage, say rent, even though it may be paid into the account of one spouse, eventually it will go to the family, may be all and may be part of it. No one keeps an account, indeed no one should, as a marriage is not a business venture.
>
> So, if and when the marriage breaks up, it is unreasonable that the court should undertake an accounting of their income and expenditure during the period the marriage subsists. The function of the court is to make a fair and equitable division of the matrimonial assets that exist at the time of the divorce, taking into account the factors provided by s. 76.

[40] In the circumstances, in our view, taking all the factors into account, including the direct financial contribution by the respondent towards the purchase of the properties, the fact that the appellant must have utilised the proceeds of the sales of the properties to purchase other properties, a reasonable division would be that the respondent is entitled to half the current value of the properties. In other words, we would confirm the order made by the learned trial judge.

[41] In view of what we have stated above, we find that there is no merit in this appeal. The appeal is hereby dismissed with costs.

[42] As to the cross-appeal filed by the respondent, we are of the view that it would be fair to allow for the variation of the orders as follows:

a) that the nett value of the assets referred to in paras. 3.1, 3.3, 3.4 and 3.5 of the *decree nisi* dated 28 May 2004 be stated as the nett value of the assets as at the date of the *decree nisi* dated 28 May 2004;

b) that the value of the assets referred to in paras. 3.1, 3.2, 3.3, 3.4, 3.5 and 3.6 of the *decree nisi* dated 28 May 2004 be valued by a qualified valuer agreed to by the parties.

[43] We also agree with the respondent that the appellant is to show:

i) letters from the respective financial institution confirming the existence and the extent of the liabilities attached to the assets; and

ii) any outstanding loans where the assets are legally charged, should then be deducted from the proceeds of the sales of the respective assets and 1/2 of the balance thereof be given to the appellant in the cross-appeal (wife).

c) that the appellant pay the respondent interest at 8% per annum on the said cash value of the assets so divided from the date of the *decree nisi* dated 28 May 2004 till date of realisation.

[44] My learned brothers Mohd. Ghazali bin Mohd. Yusoff and James Foong JJCA, have seen this judgment and expressed their agreement with it.